

The Administrative Law Judge found claimant injured her low back at work on February 4, 1997. But he found the injury was only a temporary aggravation of a preexisting back condition and the temporary injury did not result in an increase in claimant's permanent functional impairment. The Administrative Law Judge limited claimant's award to payment of authorized medical expenses and unauthorized medical expenses up to the statutory limit.

Claimant appeals and contends she proved she permanently aggravated her preexisting back condition on February 4, 1997, while lifting at work. That permanent aggravation resulted in at least a 1 percent permanent functional impairment increase. As a result of this permanent work injury, claimant contends she has permanent work restrictions that prohibit her from performing work for the respondent and even after making a good faith effort to find appropriate employment, she remains unemployed. Accordingly, claimant argues she is entitled to permanent partial general disability benefits based on an 89 percent work disability.

Furthermore, claimant contends she is entitled to an award of temporary total disability benefits for the period from February 5, 1997, through March 18, 1997, and for the period from April 2, 1997, through June 17, 1997, for a total of 17.14 weeks. The parties stipulated that the respondent had voluntarily paid claimant 10 weeks of temporary total disability benefits from February 5, 1997, through March 18, 1997, and from April 2, 1997, through April 29, 1997.

In contrast, respondent contends claimant failed to prove that she even sustained a temporary aggravation of a preexisting back condition at work. Respondent argues that the record proves that claimant is purposely exaggerating her back symptoms for the purpose of collecting a large work disability award. Respondent argues claimant should be denied workers compensation benefits.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board makes the following findings and conclusions:

The Appeals Board concludes the Administrative Law Judge's finding that claimant suffered a temporary aggravation of a preexisting back condition at work on February 4, 1997, should be affirmed. The Administrative Law Judge's findings and conclusions in this regard are found to be accurate and supported by the record. The Appeals Board, therefore, adopts those findings and conclusions as its own. In particular, the Appeals Board agrees with the Administrative Law Judge's conclusion that the medical opinions of claimant's treating physician, orthopedic surgeon Robert L. Eyster, M.D., and respondent's examining physician, Bernard T. Poole, M.D., who saw claimant on two occasions, are more persuasive and credible than the medical opinions of physiatrist Pedro A. Murati, M.D., who examined claimant only on one occasion and at her attorney's request.

Dr. Eyster's impression, based only on claimant's subjective complaints, was that claimant probably sustained a musculoskeletal irritation at work. But, based on objective findings, the doctor could not find an actual work injury. He went on to find that claimant sustained no permanent impairment as a result the work injury. Plus, Dr. Eyster testified he had a suspicion claimant had a low pain threshold and a tendency to exaggerate her symptoms.

Dr. Poole found claimant with a previous apparently sound scoliosis fusion from T6 to L4 and found no other objective abnormal physical findings. He further found claimant's work-related injury, while employed by the respondent, did not result in any additional permanent impairment of function. The doctor placed a 25-pound lifting restriction on claimant's activities because of her preexisting back condition and not as a result of the February 1997 accident. Additionally, Dr. Poole testified claimant attempted to magnify her physical findings during the examination.

The parties stipulated that respondent voluntarily paid claimant 10 weeks of temporary total disability compensation for the period from February 5, 1997, through March 18, 1997, and April 2, 1997, through April 29, 1997, at \$173.32 per week for a total of \$1,733.20. Before the Appeals Board, the parties agreed the temporary total weekly compensation rate was \$175.70. Claimant argues she is also entitled to an additional 7.14 weeks of temporary total disability compensation for the period from April 30, 1997, through June 17, 1997. The Appeals Board concludes there is no evidence in the record to support this claim. The record indicates claimant returned to work and was working at least a portion of the month of May 1997. Claimant saw Dr. Poole for the first time on May 20, 1997, and was released to return to work with a 25-pound lifting restriction. The respondent's general manager testified he would have accommodated that weight restriction but claimant failed to return to work after she left work on May 21, 1997. The respondent terminated claimant on June 8, 1997, because she failed to call or come to work after she left work on May 21, 1997.

The Appeals Board concludes there was an underpayment of temporary total disability and that the Administrative Law Judge's Award should be modified to include an award of 10 weeks of temporary total disability at the corrected weekly rate of \$175.70 for the period claimant was off work and receiving medical treatment for the temporary aggravation of her preexisting back condition.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge John D. Clark's December 3, 1998, Award should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Maria Guadalupe Nava and against the respondent, La Quinta Inn, and its insurance carrier, Kemper Insurance Company, for an accidental injury which occurred February 4, 1997, and based upon an average weekly wage of \$263.54.

Claimant is entitled to 10 weeks of temporary total disability compensation at the rate of \$175.70 per week for a total award of \$1,757.00, which is ordered paid in one lump sum less any amounts previously paid.

All authorized reasonable and necessary medical expenses are ordered paid by the respondent.

Unauthorized medical expenses up to the statutory maximum is awarded to the claimant upon proper presentation of the expense.

All other orders contained in the Award are adopted by the Appeals Board.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Brian D. Pistotnik, Wichita, KS  
Eric K. Kuhn, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director